

**Letter of Findings Number: 03-20130505P
Tax Administration: Penalty
For Tax Year 2011**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE

I. Tax Administration–Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the assessment of withholding tax penalty.

STATEMENT OF FACTS

Taxpayer is an out-of-state company with some operations in Indiana. The Indiana Department of Revenue ("Department") assessed a penalty against Taxpayer for the late filing of its WH-1 in tax year 2011. Taxpayer protested the penalty. An administrative hearing was conducted and this Letter of Findings results.

I. Tax Administration–Penalty.

DISCUSSION

Taxpayer protests the assessment of the penalty. Taxpayer states that it mistakenly relied on the advice of a third-party accounting firm in regards to the filing date for the WH-1. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

IC § 6-8.1-10-2.1 states in relevant part:

- (a) Except as provided in [IC 6-3-4-12\(j\)](#) and [IC 6-3-4-13\(l\)](#), a person that:
- (1) fails to file a return for any of the listed taxes;
 - (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
 - (3) incurs, upon examination by the department, a deficiency that is due to negligence;
 - (4) fails to timely remit any tax held in trust for the state; or
 - (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;
- is subject to a penalty.

[45 IAC 15-11-2\(c\)](#)

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty

assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

A penalty will be assessed when a taxpayer fails to timely file and remit withholding tax. However, the penalty will be waived when the failing was due to reasonable cause and not willful neglect. Taxpayer exercised "ordinary business care," as stated in [45 IAC 15-11-2\(c\)](#), when it consulted a third-party accounting firm regarding the proper way to file Taxpayer's WH-1. Taxpayer states:

On March 1, 2011, Taxpayer acquired the business giving rise to nexus with Indiana, and sought the advice of . . . [an] accounting firm regarding compliance and payment due dates for all states, and was advised by such firm during 2011 that the payment due date for Indiana was 4/15/2012.

Taxpayer further states that it "had good faith intent and would have paid by March 15, 2012 if it had been advised to do so"

Taxpayer provided documentation showing the filing schedule it relied on, which listed the form name and due dates for various states where Taxpayer had filing requirements. The document shows that for Indiana an incorrect due date of "4/15." Taxpayer also notes that it "was a new filer that first established nexus with Indiana on 3/1/11" and that Taxpayer "did not receive any instructions or mailings from Indiana prior to March 15, 2012 that would have alerted taxpayer to the March 15, 2011 due date." Additionally, Taxpayer has subsequently maintained a good filing and payment history. The evidence is sufficient to determine that Taxpayer's failure to timely file was due to reasonable cause. Therefore, the penalty will be waived pursuant to IC § 6-8.1-10-2.1(d).

FINDING

Taxpayer's protest is sustained.

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